

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
OF INTEREST TO OTHER JUDGES: YES/NO.	
REVISED.	
27/5/08 DATE	 SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

27/05/2010.
CASE NO: ~~A646/2008~~

In the matter between:

A646/2007 

THOBENI GATSHENI NDLOVU

Appellant

And

THE STATE

Respondent

JUDGMENT

LEDWABA, J

- [1] This is an appeal against conviction and sentence of the Benoni Regional court. The appellant was convicted on 23 April 2009 for murder (count 1), 3 counts of attempted murder (counts 2-4) and contravention of **section 3 of Act 60 of 2000**, unlawful possession of a firearm (count 5). On count one he was sentenced to life imprisonment, on counts 2-4 he was sentenced to 5 years imprisonment on each count and on count 5 he was sentenced to 15 years imprisonment. The sentences on counts 2-4 and the 10

years of the sentence on count 5 were ordered to run concurrently with the sentence on count 1. The appellant was further in terms of **Act 103 of Act 60 of 2000** ordered to remain unfit to possess a firearm. The appellant was legally represented at the court *a quo*. I need to mention that despite the order of the court *a quo* that certain sentences and portions thereof were to run concurrently with the sentence on count 1 in terms of **section 32(2) of the Act 8 of 1959** the other sentence will automatically be served concurrently with the life sentence imprisonment..

- [2] In the criminal trial the state called 6 witnesses to prove its case and thereafter closed its case. The Appellant testified and closed his case without calling any witness.
- [3] Boy Samson Madi (Mr. Madi) and Phillip Lodge (Mr. Lodge) testified that on 21 March 2008 at about 18h00 they together with Themba Ephraim Shongwe (the deceased) and Mandla Thango were in a restaurant at Watville Hostel in Benoni having some drinks together after they just had their supper. Mr. Lodge said he noticed Rose, the lady working in the restaurant scream and running out of the restaurant. Mr. Madi and Mr. Lodge further testified that they saw the appellant wearing an overall entering into the restaurant having a firearm and shooting in the direction of the deceased. Appellant approached the deceased, fired further, shot him and insulted him. In the first shooting incident they took cover, however, Mr Madi was struck by a bullet that went through his left arm and penetrated his

stomach. He had to undergo an operation for the bullet to be removed. Mr. Lodge was struck by one of the bullets on the right leg.

- [4] Appellant denied to have been involved in the shooting incident. Jeremiah Mlangeni and Jabulani Buthelezi (5th & 6th state witnesses) testified that they are police officers in the SAPS and Metro, respectively. On 5 April 2008, they were on duty and they saw appellant, whom they were tracing, gambling at Motloasi Street in Wattville. When appellant noticed them he ran away. They chased him and managed to arrest him after he fell. They handcuffed him, a 9mm NZ firearm, and 13 bullets were found in his possession. Constable Buthelezi described the firearm found in the appellant's possession as a Norinko NM 75mm. Appellant was thereafter taken to the police station. The firearm found in appellant's possession was booked in the SAP 13 under reference number SAP 13/129/08. A new docket for the firearm and bullets was opened at Actonville Police Station.
- [5] Appellant disputed that he ran away when he saw the police and that the firearm and ammunition were found in his possession. Actually he said that he does not know where the firearm came from. In his evidence he also said after he was arrested by the police they only found a cell phone in his possession. Thereafter he was taken to the hostel where the police told the residents that he is the person who shoots at people. He further said he was assaulted by the police.

- [6] During the trial the defence made some formal admissions in terms of **Section 220 of Act 51 of 1977**, see exhibit C, in relation to
- (i) the identity of the deceased;
 - (ii) the correctness of the post mortem report;
 - (iii) the cause of death;
 - (iv) the correctness of the identification parade when the parade was held;
 - (v) that the six spent cartridges were collected at the scene of the shoot by constable Mqubidu put in a bag and properly sealed with seal number FSB 983993 and disputed; and
 - (vi) an affidavit by Inspector Roelofse was admitted as evidence in terms of **Section 212 of Act 51 of 1977**.
- [7] Sergeant Matlala in his affidavit that was handed in as evidence in terms of **section 212**, stated that he received a 99mm Parabella Calibre Norrinco Model NZ75 semi automatic pistol, serial number obliterated in a sealed exhibit bag with seal number FSB 351779;
- [8] Appellant's legal representative on appeal, Mr. Tsatsi argued vigorously that:
- (i) Seargeant Matlala marked the fired bullets [two] 315 T1 and 315 T2 respectively, Record p114 para 6.2,
 - (ii) she never marked one[1] 9mm parabelium calibre fired test cartridge case,

- (iii) she disposed the test marked 315 T1 on 27 May 2008 in a sealed exhibit bag with number FSCC-858783 and were filed in case file LAB 61315/08

- [9] However, the appellant in the Regional Court formally admitted that the fire-arm mentioned in paragraph 3.1 of the sergeant Matlala's affidavit in terms of **section 212 of Act 51 of 1977** is the same fire-arm referred by constable Buthelezi and inspector Mlangeni. The results as mentioned in paragraph 6.1 of Inspector Roelofse's affidavit are also formally admitted, that is, that the cartridges and fired bullet collected by constable Mgubedu, as per his testimony, was fired from the same fire-arm that Inspector Mlangeni and Constable Buthelezi testified about. (Exhibit 'C').
- [10] The appellant in clause 12 of the formal admission in Exhibit C further admitted that his attorney consulted with Inspector Roelofse and Sergeant Matlala to clarify any uncertainty. In my view the uncertainty raised by Mr. Tsatsi could have been clarified with appellant's attorney in the proceedings of the court *a quo* hence the record does not raise as an issue the point raised by Mr. Tsatsi. Furthermore in an appeal an appellant is not allowed to raise new issues not raised in the notice of appeal.
- [11] Mr. Tsatsi further argued that the person who fired the shot was not properly identified by Mr. Madi and Lodge. He submitted that there were material contradictions in their evidence. It is very clear from the evidence of Mr. Madi and

Mr. Lodge that the kitchen or restaurant where the incident occurred had enough light which made visibility clear. Mr. Madi said he knew the appellant by sight because he is well known at the hostel and he used to see him when he visited the hostel on previous occasions. He also said despite the horrific incident he experienced he managed to see the appellant in the room because of the light and the appellant was about 4-5 metres away from him when he fired the shots.

- [12] The perpetrator's face was not hidden and the witnesses had enough time to see him. The appellant was identified by the witnesses at a properly held identity parade.
- [13] The contradictions about how the first two state witnesses and others were seated in relation to the door and the colour of the overall are not in my view material. Further, the state's failure to call Rose, restaurant employee, as a witness does not weaken the strong evidence of the state. Appellant does not dispute that he is well known and he just made a bare denial concerning the incident. Appellant's version that Mr. Madi and Lodge saw him at the hostel after his arrest is not substantiated and is rejected. I am satisfied that the appellant was properly identified and the identification of the witnesses is reliable.
- [14] Mr. Tsatsi further argued in the alternative that if the court finds that the appellant was properly identified, the state did

not prove beyond reasonable doubt that the appellant had the legal intention to murder the victims in counts 2-4.

- [15] In *casu*, it is clear that the appellant wanted to kill the deceased; as a consequence other people in the deceased's company were hit by bullets, but not killed. Appellant will only be criminally responsible if he had foreseen the possibility that he could either seriously injure the people who were in the deceased's company, or that they could even die, and yet persisted in his deed.

- [16] In **S v Mavhungu 1981 (1) SA 56 (AD) at 67 G-H**, by mouth of Trollip AJ:

"The State did not prove the initial, fundamental requirement that the appellant subjectively foresaw the possibility that Ndou, in carrying out the agreed common purpose of killing the mother-in-law, would instead kill someone else....Although the relevant dicta there appear in minority judgments in the sense that the other Judges concerned pursued different approaches, I think that those dicta relating to aberration ictus accord with modern thought and the trend of recent decisions of this Court generally on the need for the abovementioned subjective test to be always satisfied before any accused can be convicted of murder."

- [17] See Jonathan Burchell, '*Principles of Criminal Law*', Third edition, on page 511:

"...A intends to kill B but misses him and kills C. A's intention is 'directed at one whom he knows and recognizes to be B. It is through unforeseen and unintended factors that the blow falls upon C. It follows that A has intention in respect of C only if he foresaw the possibility of C's death, or, for the culpable homicide, if C's death was reasonably foreseeable."

- [18] As the four men were sitting around the table. In my view, appellant must have foreseen the possibility that he could strike the other complainants as well. It was clear that the deceased was not sitting alone and appellant fired several shots. Thus, the appellant is criminally responsible, having *dolus*, in the form of *dolus eventualis*.
- [19] From the information on the charge sheet, Count 4, it seems that the fourth person who was sitting at the table was Mandla Tango. Mr. Tango was seated next to the deceased. In annexure 'E' appellant submitted that there were people who sustained injuries. Mr. Madi and Mr. Lodge testified that the deceased was in the company of three people Mr Madi, Mr. Lodge and Mandla Tango who died before the matter was heard and it seems the death has nothing to do with this incident.
- [20] However, even without these factors known, the evidence is of such a nature that it can safely be concluded that the appellant has *dolus eventualis*, also in respect of Mr. Mandla Tango.
- [21] It was argued on behalf of the appellant that as it was not explained to the appellant that there was a possibility that life sentence imprisonment may be imposed, a serious irregularity occurred. Counsel for the respondent, on the contrary, argued that the appellant had a legal representative

and appellant was not prejudiced by the alleged failure to explain.

- [22] The charge sheet only refers to the provisions of **section 51(2) of the Criminal Law Amendment Act, 105 of 1997** (the **Act**) and it does not refer to the provisions of **section 51(1) of the Act** which deals with the imposition of life imprisonment.
- [23] In the case of **S v Ndlovu 2003 (1) SACR 331 SCA**, the court held that where the State intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention be pertinently brought to the attention of the accused at the outset of the trial, if not in the charge sheet then in some other form, so that the accused is placed in a position to properly appreciate in good time the charge that she or he faces as well as its possible consequences. What will at least be required is that the accused be given sufficient notice of the State's intention to enable the accused to properly conduct his or her defence.
- [24] In the case of **S v Chowe 2010 (1) SACR 141GNP**, Mavundla J, correctly, in my view, said that the fact the accused is legally represented at his criminal trial does not take away the need to inform the accused that the minimum sentencing dispensation provided for in **section 51 of the Act** will be relied upon for sentencing.

[25] The fact that appellant was not pertinently informed about the provision of **section 51(1) of the Act** in respect of count 1, and the provisions of **section 51(2) of the Act**, in respect of count 5, it is, in my view, justified to interfere with the sentences imposed by the court *a quo*.

[26] I therefore make the following order:

- (1) Appeal against the conviction is dismissed and the conviction on all the counts are confirmed.
- (2) Appeal against sentence is upheld. The sentences are set aside and replaced with the following sentences:
 - 2.1 *On count 1, the appellant is sentenced to 20 years imprisonment.*
 - 2.2 *Counts 2, 3 and 4 are taken together for sentencing purposes, the appellant is sentenced to 5 years imprisonment.*
 - 2.3 *On count 5 the appellant is sentenced to 3 years imprisonment."*
- (3) It is ordered that the sentences in count 2, 3, 4 and 5 are to run concurrently with the sentence on count 1. Effectively the appellant is sentenced to 20 years imprisonment, which sentence is antedated to 23 April 2009.



A. P. LEDWABA
JUDGE OF THE HIGH COURT

I agree,



N P MNGQIBISA-THUSI
JUDGE OF THE HIGH COURT
